



Agriculture Committee

Wednesday- April 5, 2006

2pm - 3pm

214 The Capitol

Meeting Packet

Allan G. Bense
Speaker

Ralph Poppell
Dwight Stansel
Co-Chairs

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Agriculture Committee

Start Date and Time: Wednesday, April 05, 2006 02:00 pm

End Date and Time: Wednesday, April 05, 2006 03:00 pm

Location: 214 Capitol

Duration: 1.00 hrs



Consideration of the following bill(s):

HB 7209 Review under the Open Government Sunset Review Act regarding the Total Maximum Daily Load Program for State Waters by Governmental Operations Committee

NOTICE FINALIZED on 04/03/2006 14:34 by SIMS-DAVIS.LINDA

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7209 PCB GO 06-14 OGSR Total Maximum Daily Loads
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: **IDEN./SIM. BILLS:** SB 1212

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
1) Agriculture Committee		Kaiser 	Reese 
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for agricultural records relating to processes or methods of production, costs of production, profits, or other financial information held by the Department of Agriculture and Consumer Services. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill may have a minimal non-recurring positive fiscal impact on state government. The bill does not appear to have a fiscal impact on local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

The Florida Watershed Restoration Act and Total Maximum Daily Loads

The federal Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act (CWA), established the basic framework for pollution control in the nation's water bodies. Its primary goal was to have the nation's water bodies clean and useful. By setting national standards and regulations for the discharge of pollution, the intent of the CWA was to restore and protect the health of the nation's water bodies.¹

Section 305(b) of the CWA requires states to submit to Congress a biennial report on the water quality of their lakes, streams, and rivers. A partial list of water bodies that qualify as "impaired" (i.e., do not meet specific pollutant limits for their designated uses) must be submitted to the U.S. Environmental Protection Agency under section 303(d) of the CWA. States are required to develop total maximum daily loads (TMDL) for each pollutant that exceeds the legal limits for that water body. Section 303(d) and the development of TMDLs generally were ignored by the states until environmental groups began filing lawsuits.²

In 1999, the Florida Legislature passed the Florida Watershed Restoration Act (WRA), which codified the establishment of TMDLs for pollutants of water bodies.³ The WRA requires the Department of Environmental Protection (DEP) to promulgate rules relating to the methodology for assessing, calculating, allocating, and implementing the TMDL process.⁴ The WRA also directs that the TMDL process be integrated with existing protection and restoration programs, and coordinated with all state agencies and affected parties.⁵

TMDLs describe the amount of each pollutant a water body can receive without violating state water quality standards.⁶ TMDLs are the sum of waste load allocations, load allocations, and a margin of safety to account for uncertain conditions. Waste load allocations are pollutant loads attributable to existing and future point sources, such as discharges from industry and sewage facilities. Load allocations are pollutant loads attributable to existing and future nonpoint sources such as the runoff from farms, forests, and urban areas. Even though an individual discharge into a water body may meet established standards, the cumulative and multiplier effect of discharges from numerous sources can cause a water body not to meet the quality standards.⁷

¹ See *House of Representatives Staff Analysis HB 1839 CS* by the State Resources Council, April 25, 2005, at 2.

² *Id.*

³ Chapter 99-223, Laws of Florida; s. 403.067, F.S.

⁴ Section 403.067(3)(b), F.S.

⁵ Subsections (1) and (3) of section 403.067, F.S.

⁶ Section 403.067(6)(a), F.S.

⁷ See *House of Representatives Staff Analysis HB 1839 CS* by the State Resources Council, April 25, 2005, at 2.

DEP may develop a basin management action plan (BMAP) as part of the development and implementation of a TMDL for a water body.⁸ The plan must:

- Integrate appropriate management strategies available to the state through existing water quality protection programs to achieve the TMDL;
- Restore designated uses of the water body;
- Provide for phased implementation of strategies;
- Establish a schedule for implementing strategies;
- Establish a basis for evaluating the plan's effectiveness;
- Identify feasible funding strategies; and
- Equitably allocate pollutant reductions to basins as a whole or to each point or nonpoint source.⁹

The BMAP also must include milestones for implementation and water quality improvement, and an associated water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is achieved over time.¹⁰ Progress assessments are required every five years and revisions to the plan are required, as appropriate.¹¹

Public Records Exemption

Current law provides a public records exemption for certain agricultural records. Individual agricultural records relating to processes or methods of production, or relating to costs of production, profits, or other financial information that are reported to the Department of Agriculture and Consumer Services as part of best management practices for reducing water pollution are confidential and exempt¹² from public records requirements.¹³ Upon request, the department may release the confidential and exempt records to DEP or any water management district.

Pursuant to the Open Government Sunset Review Act,¹⁴ the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It also makes editorial changes.

The bill maintains the provision requiring DEP or any water management district with authorized access to such records to maintain the confidential and exempt status of those records. In *Ragsdale v. State*,¹⁵ the Supreme Court held that

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record . . . the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.¹⁶

⁸ Section 403.067(7)(a)1., F.S.

⁹ *Id.*

¹⁰ Section 403.067(7)(a)5., F.S.

¹¹ *Id.*

¹² There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. See Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹³ Section 403.067(7)(c)5., F.S.

¹⁴ Section 119.15, F.S.

¹⁵ 720 So.2d 203 (Fla. 1998).

¹⁶ *Id.* at 206, 207.

In *City of Riviera Beach v. Barfield*,¹⁷ the court stated “[h]ad the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.”¹⁸ As such, the provision is *unnecessary*, because had the Legislature intended for the confidential and exempt status to evaporate then the Legislature would have stated as much.

C. SECTION DIRECTORY:

Section 1 amends s. 403.067(7), F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The bill may represent a minimal non-recurring positive impact on state expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment as a result of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, state government may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

This bill does not create, modify, amend, or eliminate local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

¹⁷ 642 So. 2d 1135 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public records exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined “once a record is transferred from one public agency to another, the record loses its exempt status.” The court declined to accept the Attorney General’s view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

¹⁸ *Id.* at 1137.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Governmental Operations Committee reported PCB GO 06-14 favorably with one amendment. The amendment reinserts the provision requiring the Department of Environmental Protection or any water management district with authorized access to confidential and exempt records to maintain the confidential and exempt status of those records.

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1 A bill to be entitled
2 An act relating to a review under the Open Government
3 Sunset Review Act regarding the total maximum daily load
4 program for state waters; amending s. 403.067, F.S., which
5 provides an exemption from public records requirements for
6 agricultural records relating to processes or methods of
7 production, costs of production, profits, or other
8 financial information held by the Department of
9 Agriculture and Consumer Services pursuant to interim
10 measures, best management practices, and other measures
11 used to achieve levels of pollution reduction established
12 by the department; making editorial changes; removing the
13 scheduled repeal of the exemption; providing an effective
14 date.

15
16 Be It Enacted by the Legislature of the State of Florida:

17
18 Section 1. Paragraph (c) of subsection (7) of section
19 403.067, Florida Statutes, is amended to read:

20 403.067 Establishment and implementation of total maximum
21 daily loads.--

22 (7) DEVELOPMENT OF BASIN MANAGEMENT PLANS AND
23 IMPLEMENTATION OF TOTAL MAXIMUM DAILY LOADS.--

24 (c) Best management practices.--

25 1. The department, in cooperation with the water
26 management districts and other interested parties, as
27 appropriate, may develop suitable interim measures, best
28 management practices, or other measures necessary to achieve the

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level of pollution reduction established by the department for nonagricultural nonpoint pollutant sources in allocations developed pursuant to subsection (6) and this subsection. These practices and measures may be adopted by rule by the department and the water management districts pursuant to ss. 120.536(1) and 120.54, and, where adopted by rule, shall be implemented by those parties responsible for nonagricultural nonpoint source pollution.

2. The Department of Agriculture and Consumer Services may develop and adopt by rule pursuant to ss. 120.536(1) and 120.54 suitable interim measures, best management practices, or other measures necessary to achieve the level of pollution reduction established by the department for agricultural pollutant sources in allocations developed pursuant to subsection (6) and this subsection. These practices and measures may be implemented by those parties responsible for agricultural pollutant sources and the department, the water management districts, and the Department of Agriculture and Consumer Services shall assist with implementation. In the process of developing and adopting rules for interim measures, best management practices, or other measures, the Department of Agriculture and Consumer Services shall consult with the department, the Department of Health, the water management districts, representatives from affected farming groups, and environmental group representatives. Such rules shall also incorporate provisions for a notice of intent to implement the practices and a system to assure the implementation of the practices, including recordkeeping requirements.

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3. Where interim measures, best management practices, or other measures are adopted by rule, the effectiveness of such practices in achieving the levels of pollution reduction established in allocations developed by the department pursuant to subsection (6) and this subsection shall be verified at representative sites by the department. The department shall use best professional judgment in making the initial verification that the best management practices are effective and, where applicable, shall notify the appropriate water management district and the Department of Agriculture and Consumer Services of its initial verification prior to the adoption of a rule proposed pursuant to this paragraph. Implementation, in accordance with rules adopted under this paragraph, of practices that have been initially verified to be effective, or verified to be effective by monitoring at representative sites, by the department, shall provide a presumption of compliance with state water quality standards and release from the provisions of s. 376.307(5) for those pollutants addressed by the practices, and the department is not authorized to institute proceedings against the owner of the source of pollution to recover costs or damages associated with the contamination of surface water or groundwater caused by those pollutants.

4. Where water quality problems are demonstrated, despite the appropriate implementation, operation, and maintenance of best management practices and other measures according to rules adopted under this paragraph, the department, a water management district, or the Department of Agriculture and Consumer Services, in consultation with the department, shall institute a

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reevaluation of the best management practice or other measure.
Should the reevaluation determine that the best management practice or other measure requires modification, the department, a water management district, or the Department of Agriculture and Consumer Services, as appropriate, shall revise the rule to require implementation of the modified practice within a reasonable time period as specified in the rule.

5. ~~Individual~~ Agricultural records relating to processes or methods of production, ~~or relating to~~ costs of production, profits, or other financial information held by which are ~~otherwise not public records, which are reported to the~~ Department of Agriculture and Consumer Services pursuant to subparagraphs 3. and 4. or pursuant to any rule adopted pursuant to subparagraph 2. are ~~shall be~~ confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Upon request, records made confidential and exempt pursuant to this subparagraph shall be released to ~~of the department or any water management district, the Department of Agriculture and Consumer Services shall make such individual agricultural records available to that agency,~~ provided that the confidentiality specified by this subparagraph for such records is maintained. ~~This subparagraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

6. The provisions of subparagraphs 1. and 2. shall not preclude the department or water management district from requiring compliance with water quality standards or with

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113 current best management practice requirements set forth in any
114 applicable regulatory program authorized by law for the purpose
115 of protecting water quality. Additionally, subparagraphs 1. and
116 2. are applicable only to the extent that they do not conflict
117 with any rules adopted by the department that are necessary to
118 maintain a federally delegated or approved program.

119 Section 2. This act shall take effect October 1, 2006.